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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

THE ORDER OF RAILROAD TELEGRAPHERS, PETITIONER

vs.

RAILWAY EXPRESS AGENCY, INCORPORATED, RESPONDENT

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Petitioner.

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THE ORDER OF RAILROAD TELEGRAPHERS, PETITIONER

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals, Fifth Circuit, and Brief in support thereof.

Now comes The Order of Railroad Telegraphers, and prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Fifth Circuit, to review here the record and judgment entered by that court on July 9, 1943 (R. 380).

Opinion Below

The opinion of the Circuit Court of Appeals was entered July 9, 1943 (R. 370-379) and is not yet reported. The opinion of the District Court, Findings of Fact and Conclusions of Law is found in (R. 335-353).

Jurisdiction

The jurisdiction of this Court is invoked under Section

240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U.S.C.A. 347, 43 Stat. 938).

Statutes Involved

The suit was brought by The Order of Railroad Telegraphers to enforce an award rendered by the National Railroad Adjustment Board. Such suit was filed in the District Court of the United States for the Northern District of Georgia, under Section 153(p) of the Railway Labor Act, as amended, (Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U.S.C. 151 et seq.). Certain provisions of the Railway Labor Act of 1926, c. 347, 44 Stat. 577; U.S.C. Tit., 45 Secs. 151-163, are involved because the change in rates of pay was effected in 1930, in violation of the provisions of Section 6 and related provisions of the Act of 1926.

The portion of the Act of 1926 principally concerned is Section 6, which provides as follows:

> Procedure in Changing Rates of Pay, Rules and Working Conditions.
>
> "Sec. 6. Carriers and the representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules, or working conditions, and the time and place for conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. * * In every case where such notice of intended change has been given or conferences are being held with reference thereto, or the services of the Board of Mediation have been requested by either party, or said board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the Carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Board of Mediation, unless

a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Board of Mediation."

The provisions of the Railway Labor Act (Act of June 21, 1934) herein involved are Section 153, First (i), (p) and (q). The applicable sub-divisions of this section are set forth in the Appendix to this Brief.

In addition the General Duties prescribed in the Act of 1926, are similarly involved:

"Sec. 2. First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute.

Third. Representatives, for the purpose of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other.

Fourth. In case of a dispute between a carrier and its employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions it shall be the

duty of the designated representative or representatives of such carrier and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided* (1) That the place so specified shall be situated upon the railroad line of the carrier involved unless otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Fifth. Disputes concerning changes in rates of pay, rules or working conditions shall be dealt with as provided in section 6 and in other provisions of this Act relating thereto."

The sanctions of the criminal as well as the civil law have by Section 2, Tenth of the Act of June 21, 1934, been made applicable, to changes, without thirty days' notice in the rates of pay, rules or working conditions of classes of employees (Section 2, Seventh) (Section 2, Fifth of the Act of 1926), to interferences with labor organizations of employees, (Section 2, Fourth) to coercive attempts to induce employees to join or not to join a labor organization (Section 2 Fourth and Fifth) and to interferences with the designation of representatives (Section 2, Third).

Questions Presented

1. Whether or not Section 6 of the Railway Labor Act of 1926 is to be construed, in its application to the facts of this case, so as to permit a carrier to alter rates of pay, rules,

or working conditions of any of its employees, in effect at the time of the passage of the Act, without first giving at least thirty days' written notice to the authorized and designated representative of the employees of an intended change affecting rates of pay, rules or working conditions, in an effort to reach an agreement as to a time and place for conference between the representatives of the parties interested in such intended changes.

2. Whether or not, where a majority of a craft or class has selected a representative, signatory to an agreement, a carrier is free to make with any one it pleases and for any group it pleases, contracts altering established rates of pay, rules, or working conditions, without notice to or conferences with the designated representatives of the employees involved.

3. Whether or not Section 6 and Section 2, Second and Fourth of the Act of 1926, manifest an intent on the part of Congress that carriers shall confer with representatives of the employees before changing rates of pay, rules or working conditions.

4. Whether or not the conclusion of the court below, to the effect that a group of employees affected accepted compensation, not in the terms provided in the agreement, but upon those fixed by the carrier, deprived the representative organization of a right of action in a suit upon an award under Section 153 (p) of the Act, as amended.

5. Whether or not the conclusion of the court below that the bar of the state statute of limitations has fallen as to all of the amounts due under the terms of the award which accrued more than six years before suit was filed, ousts the jurisdiction of the United States District Court in a suit for an order to enforce an award brought within the statutory period as provided in Section 153 (q) of the Act, as amended.

6. Whether or not the Railway Labor Act of 1926 is to be construed, in its application to the facts of this case, so as to permit any alteration by a carrier of rates of pay, rules, or working conditions, in effect at the time of the passage of the Act, without the carrier exerting every reasonable effort to comply with the requirements of the Act prescribing a brief period of attempted mediation with the representative of its employees designated so to confer in the manner provided by the Act.

7. Whether or not the Railway Labor Act of 1926, imposes a legally enforceable obligation on carriers to give thirty days' written notice of an intended change in rates of pay, and to confer with designated representatives of the employees before changing rates of pay.

Specification of Errors

The Circuit Court of Appeals erred—

1. In holding that the suit filed to enforce an award of the National Railroad Adjustment Board was a suit upon a contract between the railroad labor organization representing employees and the carrier.

2. In holding that a collective bargaining agreement covering all employees of a craft or class regulating rates of pay, rules, or working conditions may be changed by a carrier signatory thereto without mandatory notice and conference prescribed by statute and that employees, at the instance of the carrier, may waive their rights through special individual agreements changing the whole structure as to rates of pay under threat of removing the agency from the stations.

3. In holding that acceptance of the reduced commission rates of pay by the employees at the instance of the carrier, deprived the authorized and designated representative

labor organization of the right to seek enforcement of an award sustaining the claims of the organization arising under its agreement.

4. In holding in disregard of the provisions of Section 6 of the Railway Labor Act of 1926, a carrier may, where the majority of a craft or class has selected a representative and a collective bargaining agreement has been promulgated, make with all such employees specific individual agreements altering rates of pay, without notice to or conference with the designated representatives of the employees.

5. In holding in disregard of the Railway Labor Act of 1926, the representative of the majority is not to represent the craft or class for the purposes of the Railway Labor Act, and that such Act does not reserve exclusively to craft representatives as opposed to individual employees the changing of collective agreements with respect to rates of pay, rules or working conditions affecting employees previously hired under the terms of such collective agreements.

6. In holding that the statute of limitations of the state of Georgia was a bar to an action on an award of the National Railroad Adjustment Board sustaining claims of the petitioning organization based upon continuing violations of a collective bargaining agreement.

7. In reversing the judgment of the District Court.

Summary Statement of the Matter Involved

Petitioner is a voluntary unincorporated association, national in scope, selected by crafts and classes of employees of carriers by railroad in accordance with the provisions of Section 2, of the Railway Labor Act. Respondent, a corporation, took over the express business on the Seaboard Air Line Railway upon dissolution of the American Railway Express

Company March 1, 1929. On that date the Railway Express Agency, Inc., in fact assumed, and operated under, the collective bargaining contract executed in 1917 between The Order of Railroad Telegraphers and the Southern Express Company regulating rates of pay, rules and working conditions governing the Southern Express Company's agents jointly employed as railroad and express agents, on the Seaboard Air Line Railway (R. 19-22).

The court below after referring to the evidence before the National Railroad Adjustment Board said: "We cannot say, when all of this evidence is considered, that the board's finding that the company in fact assumed, and operated under, the contract is without support in the evidence." (R. 375).

The Railway Labor Act of 1926, provided in Section 6, that carriers and representatives of the employees shall give at least thirty days' written notice of an intended change affecting rates of pay, rules or working conditions and shall agree upon the time and place of conference.

It was stipulated between the Telegraphers and the Express Agency that no notice of cancellation or any other notice was ever served on any of the General Chairmen of The Order of Railroad Telegraphers, hereafter referred to as Telegraphers, signatory to the Agreement of August 1, 1917 (R. 65).

The rules and rates of pay of the contract were applied by the Railway Express Agency, Inc., hereafter referred to as Express Agency, from March 1, 1929, to April 10, 1930. On March 25, 1930, the Express Agency, through one of its division superintendents, notified by letter each of the individual joint railroad-express agents under his supervision, that on and after April 10, 1930, the compensation which the Express Agency would pay for handling a carload shipment by express would be $5.00 per car instead of the per-

centage rate of agency commissions (R. 137). A similar notice was given by another division superintendent on April 8, 1930, to all joint railroad-express agents in his territory that the compensation of $5.00 per car would become effective with business on and after April 10, 1930 (R. 138).

The action of the Express Agency was protested by the Telegraphers through its Local Chairman in June, 1930 (R. 315). The Express Agency informed the Seaboard Air Line Railway Company shortly thereafter (R. 323) that it declined the claim made on behalf of Dinkins joint railway-express agent at Lawtey, Florida.

This claim and related claims remained unadjusted (R. 333). No voluntary board of adjustment having been agreed upon as provided in Section 3, of the Act of 1926, attempts to adjust the claims were renewed by the General Chairman (R. 324, 326, 327). Upon creation of the National Railroad Adjustment Board in 1934, efforts were made by the Telegraphers to secure the Express Agency's agreement to enter into a joint submission of the dispute to that Board. It was refused (R. 333).

Failing to adjust the dispute concerning the claims which arose as a result of altering the rates of pay, the matter was referred by the Telegraphers, representing the joint railroad-express agents, to the National Railroad Adjustment Board, Third Division.

In the hearings before the Adjustment Board, the Express Agency maintained:

1. That the members of the Telegraphers organization were not employees of the Express Agency and it was not their employer within the terms and provisions of the Railway Labor Act.*

*Express Agency's claim that the agents concerned were not in its employ was abandoned in the District Court (R. 57); (Court of Appeals' opinion (R. 373).

2. Even if the joint railroad-express agents were its employees, within the provisions of the Railway Labor Act, the Telegraphers had no contract with the Express Agency which would form the basis of a dispute under Section 153 (i) of the Railway Labor Act, as amended.

A deadlock having ensued among the members of the Third Division of the Adjustment Board over the question of jurisdiction, the National Mediation Board, upon request, appointed a neutral person as referee in order that the dispute could be again considered and a majority decision reached. Upon full consideration by the Third Division of the Adjustment Board, with a referee sitting as a member thereof, an award (R. 224-239) was rendered ordering that the case be heard on its merits.

Subsequently the Express Agency filed its response on the merits and further hearings were held before the Adjustment Board which again ended in a deadlock and the National Mediation Board was again requested to, and did appoint a neutral person other than the referee previously appointed to sit with the Adjustment Board as a member thereof to consider the dispute and endeavor to reach a majority decision. After oral argument before the referee by both parties to the dispute, the Third Division of the Adjustment Board rendered its award No. 548, (R. 7-16) for the enforcement of which this suit was filed under Section 153 (p) of the Railway Labor Act.

A Stipulation of Facts was entered into and filed in the District Court at the trial (R. 60-100, Exhibits 101-314). Following the opinion (R. 335-353), the District Court entered Findings of Fact and Conclusions of Law and Judg-

ment on the Award (R. 353-358).

On appeal to the Circuit Court of Appeals, that Court affirmed the District Court in the following particulars, and held:

1. The Third Division of the National Railroad Adjustment Board had jurisdiction of the dispute. (R. 374.)

2. The Express Agency in fact assumed, and operated under, the contract between the Telegraphers through its General Chairman and the Southern Express Company. (R. 375.)

The Court below, however, erroneously held that the suit filed by the Telegraphers was one on a contract and that the individual notices sent by the Express Agency to the 344 joint railroad-express agents, represented by the Telegraphers, constituted sufficient notice under the agreement and the acceptance of the altered rate of pay prevented the employees for themselves and the union for them, from any right of action to recover more. (R. 377).

As a basis for reversing the judgment of the District Court, the Court below misinterpreted the opinion of this Court in *Virginian Railway Co., v. System Federation No.* 40, 300 U. S. 515, 548-9, in holding that a carrier, subject to the Railway Labor Act, was permitted to make such individual contracts as it may elect to make directly with all of its employees, regardless of whether a collective agreement covering a craft or class was in existence, and that altering the rates of pay therein prescribed could be effected without the requisite statutory notice to and the resulting conferences with the designated representatives of the employees as provided in the Railway Labor Act.

Reasons for Granting the Writ

This case presents important new questions with respect to the construction of the Railway Labor Act of 1926, as amended June 21, 1934. The decision of the Court of Appeals below should be reviewed by this Court because:

1. It is a matter of public importance that the Railway Labor Act of 1926, should be properly and reasonably construed so that collective bargaining agreements in existence at the time of the passage of the Railway Labor Act may be maintained, and that no change in or alteration of the rates of pay, rules, or working conditions prescribed in such agreements may be effected without the performance of the mandatory duty imposed by the Act to confer with respect to the alteration of such agreements.

2. The decision of the Court of Appeals below is in conflict with the decision of this court in *Virginian Railway Co. v. System Federation No.* 40, 300 U.S. 548-9, in construing the Railway Labor Act as permitting individual contracts altering rates of pay prescribed in a collective bargaining agreement without notice to or conference with the designated representatives of the employees.

3. The decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals in the Seventh Circuit, in *National Labor Relations Board v. J. I. Case Company*, 134 F. (2d) 70, certiorari granted, 318 U.S. ..... in sustaining individual special agreements which were the fruits of an unfair labor practice, and is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *Burke v. Morphy*, 109 F (2d) 572, certiorari denied, 310 U.S. 635, in approving methods employed repugnant to the Act, in altering rates of pay.

4. The decision of the Court of Appeals is contrary to and conflicts with the decisions of this Court in *Texas & New Orleans Railroad Co. v. Brotherhood of Railway Clerks*, 281 U.S. 548; *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1., *and National Licorice Company v. National Labor Relations Board*, 309 U.S. 350.

This Court has dealt with the distinct prohibition against coercive measures and reiterated its views on the necessities of labor organizations and that unions were essential to give laborers opportunity to deal on an equality with their employer.

5. The right of the Telegraphers and the public interest in the efficient operation of railroad and express transportation are seriously impaired by the decision of the Court of Appeals below.

6. This is the first occasion that there has been presented to this Court the question of the validity of special individual agreements altering rates of pay, prescribed in a collective bargaining agreement under the Railway Labor Act without notice to or conference with designated representatives of the employees, and should be decided by this Court.

The Court of Appeals has decided and we believe erroneously, questions of great public importance affecting and disturbing relations between carriers and their employees on all railroads subject to the Railway Labor Act and inevitably encouraging disputes between the standard railroad labor organizations and management, which should be avoided so far as possible particularly in the present time of war.

I

The Railway Labor Act Imposes A Legally Enforceable Obligation On Carriers To "Give At Least Thirty Days' Written Notice Of An Intended Change Affecting Rates Of Pay," And To Attempt To Agree Upon A "Time And Place For Conference Between The Representatives Of The Parties," Before Altering Rates Of Pay.

The main question involved is whether or not Section 6 of the Railway Labor Act of 1926, is to be construed in its application to the facts in this case, so as to permit a carrier to alter the rates of pay, rules, or working conditions of any of its employees, in effect at the time of the passage of the Act, without first giving at least thirty days' written notice to the representatives of the employees of an intended change affecting rates of pay, rules, or working conditions, in an effort to reach an agreement as to a time and place for conference between the representatives of the parties interested in such intended changes.

The primary purpose of the Railway Labor Act of 1926 was to protect commerce. The Act clearly manifests the intention of Congress to encourage, and in certain instances, to require collective bargaining between carriers and their employees, through designated representatives, as a means of effecting the settlement of disputes between carriers and their employees which might tend to interrupt the flow of commerce or the operation of a carrier engaged in interstate commerce.

Congress encouraged the *making* and *maintaining* of collective bargaining agreements concerning rates of pay, rules or working conditions between carriers and their employees (Section 2, First) through *representatives,* "designated by the respective parties in such manner as may be provided in their corporate organization, unincorporated association, or by

other means of *collective action,*" (Section 2, Third), and provided that "all disputes between a carrier and its employees shall be considered, and, if possible, decided, with all expedition, *in conference between representatives,* designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute." (Section 2, Second).

While all disputes between a carrier and its employees were required by Section 2, Second, to be considered, and, if possible, decided, with all expedition, in conference between representatives of the parties interested in the dispute, Section 2, Fourth, Fifth, and Section 6 of the Act outlined the particular mode of procedural processes to be complied with respecting attempted mediation of two specified classes of disputes. Section 2, Fourth, outlined the procedure to be complied with in disputes between a carrier and its employees "arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions."

Section 2, Fifth, provided:

> "Disputes concerning changes in rates of pay, rules, or working conditions shall be dealt with as provided in Section 6 and in other provisions of this Act relating thereto."

Section 6 provided for notice to and an attempt to arrange a conference between representatives of the parties interested in an intended change, before any change should be made.

In each of these two specified classes of disputes, Congress imposed upon the designated representative or representatives of the carriers and of such employees, the duty to give notice and to attempt to agree upon (Section 6) or specify (Section 2, Fourth) a time and place for conference between the representatives of the parties interested in the dispute, so that the

dispute should be considered, and, if possible, decided, with all expedition, in conference between such representatives of the parties. (Section 2, Second). Congress specifically enacted a statutory prohibition against a carrier altering rates of pay, rules, or working conditions, in effect at the time of the passage of the Act, until after the representatives of the carrier and the representatives of the employees had exerted every reasonable effort to consider such disputes in conference. (Section 6.).

Would a notice sent under Section 6 of the Act of 1926 by representative of a carrier ("designated and authorized so to confer") to any person other than the representative of the employees, ("designated and authorized so to confer"), meet the requirements of the statute? The first duty placed upon the recipient of the notice is that he attempt to agree "within ten days after the receipt of the notice," upon "the time and place for conference between the representatives of the parties interested in such intended changes." Can it be said that the notice so provided was intended to be given to any person other than the representative so designated to confer? Can it be said that Congress intended the notice to be given to some individual employee and that such individual employee should have a duty to make an agreement with the representative of the carrier as to the time and place for conferences between the representative of the carrier and the representative of the employee? We do not think so. The notice obviously was to be sent to the representative of the employees who could reach an agreement as to the time and place of a conference between himself and the representative of the carrier. The provision of Section 2, Second, that *all* disputes be considered "with all expedition" in conference between representatives, precludes toleration of the delay which would arise upon notice not being sent directly to the repre-

sentative designated and authorized so to confer. The notice contemplated is a notice to the *representative* of the employees, and not otherwise. Whether the disputes in this case be considered as having arisen under Section 2, Fourth, or under Section 6, they were disputes under Section 2, Second, and were required to be "considered, . . . with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier and the employees thereof interested in the dispute."

Congress froze the rates of pay, rules and working conditions which were in effect between carriers and their employees by the provisions of Section 6, and provided further that such frozen "rates of pay, rules and working conditions shall not be altered by the carrier . . . unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Board of Mediation."

Aside from the provisions of Section 6, there was provided certain subsequent procedure, mandatory in character, which indicates the extent to which Congress has gone to safeguard railroad employees against summary and arbitrary alterations of rates of pay, rules or working conditions prescribed in their collective agreements with carriers. As outlined in the foregoing section, following the giving of notice, the Act requires holding of conferences between the parties. Where such conferences are unsuccessful, either party may invoke the services of the Board of Mediation, or the Board may proffer its services. (Section 5, First, Act of 1926.) That section places the duty of the Board of Mediation "as its final required action," if its efforts to bring about a settlement through mediation have been unsuccessful, to induce the parties to submit to arbitration. In the event that the dispute be not adjusted under the foregoing provisions of the Act, and

an emergency Board is created under Section 10, for thirty days thereafter, no change shall be made by the parties to the controversy in the conditions out of which the dispute arose.

It is undisputed that no notice as provided in Section 6 was given to the authorized representatives of the employees of intention to alter the rates of pay provided in the collective agreement. The record is devoid of showing that Section 6 was complied with, and there was no contention either in the Express Agency's pleading or argument to the court that the duty of giving notice under Section 6 of the Act was complied with. The District Court in the opinion held (R. 351) "The notice was not in compliance with the terms of the Railway Labor Act of 1926 in effect at that time." The District Court, in its additional findings of fact, (R. 356) found: "(7) No notice was given by the agency to the representatives of the joint agents of the carrier's intention to change the terms of the agreement of August 1, 1917, as provided in Article 14 of the agreement, nor was any notice given in compliance with the terms of Section 6 of the Railway Labor Act of 1926, in effect at that time."

This finding, that the notice of the change of rates of pay was not in accordance with the terms of Section 6 of the Act of 1926, was not excepted to and was not specified in the statement of points to be relied upon on appeal. (R.360-363).

It cannot be successfully denied that the Express Agency was attempting to change a collective agreement embodying a whole class into a large number of individual contracts embodying all the members of that class. The individual contracts between a carrier and its employees, made in the manner which the Express Agency attempted to use in this case, are not the types of individual contracts which were approved in the case of *Virginian Ry. Co. v. System Federa-*

tion No. 40, etc., 300 U. S. 515.

It would appear that the language employed in Section 2, Fifth, and Section 6, of the Act of 1926, would furnish no means of escape from the conclusion that the duties required by the sections are mandatory and that no change affecting rates of pay can be validly accomplished without giving the thirty days' notice and following subsequent procedural processes.

The commands and prohibitions of these sections are clear and positive. The use of the word "shall" indicates that the direction is mandatory. It is the language of command, not advice. (Escoe v. Zerbst, 295 U. S. 490, 493.) When the purposes of the act are considered, there can be no doubt that the requirements of the Act for the giving of notice, etc., are mandatory upon the carrier employer. (*Virginian Ry. Co. v. System Federation No. 40*, 300 *U. S.* 515, 542-545.) Were the requirements of the Act advisory, the procedure herein outlined, which is designed to facilitate voluntary adjustment of disputes by requiring the *status quo* to be maintained after the giving of notice and until at least thirty days after Mediation has failed or the Emergency Board has made its report, would be useless.

The Act, as amended June 21, 1934, strengthened the making and maintaining of agreements and prohibited arbitrarily altering rates of pay prescribed in agreements by the addition of Section 2, Tenth, providing that a willful failure or refusal of a carrier, its officers or agents to comply with the terms of Section 2, Seventh, is a misdemeanor and punishable by fine or imprisonment, or both. The provisions of Section 2, Seventh, may be compared to Section 2, Fifth, of the Act of 1926.

The Act, as it stood in 1926 when first enacted, imposed definite and enforcible obligations notwithstanding the

absence of statutory penalties. (*Texas & N. O. R.R. Co. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548, 567, 569.) Criminal sanctions were plainly not necessary to the enforcement of the provisions of the Act, they were added by the amendment of 1934, (Section 2, Tenth,), to prevent a carrier from changing rates of pay, prescribed in a collective agreement or in Section 6 of the Act.

An effort on the part of a carrier to change rates of pay, etc., without giving the thirty days' notice required by Section 6 was enjoined in *Railway Employees Coop. Assn. v. Atlanta B. & C. R. R. Co.* (D. C. Ga. 1938) 22 F. Supp. 510, where the prohibitory and mandatory effect of Section 6 was recognized.

In a case arising under the Newlands Act (Public No. 6, (63d Congress) approved July 15, 1913), a prohibition similar in effect was enforced. Section 9 of that Act provided that whenever receivers appointed by a Federal Court were in possession of a railroad "no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application.* * *" In *Birmingham Tr. & Sav. Co. v. Atlanta, B. & A. Ry. Co.* (D.C.N.D. of Ga. 1931) 271 Fed. 731, an order of the court authorizing a reduction of wages without the delay of twenty days was held to be without legal effect. The court upheld the validity of the Act in that case.

The Railway Labor Act of 1926 applied to the facts in this case was and is controlling as to the issues involved. The District Judge so construed and applied the Act. In his opinion (R. 351) the District Judge held as to the notice relied upon by the Express Agency:

"This notice was not in compliance with the terms of the Railway Labor Act of 1926, in effect at that time. It purported to be effective immediately, thus not giving the required thirty days' notice and failed to give the time and place for conferences between the representatives of the parties interested in such intended changes. It was, therefore, impossible to provide the time for conferences provided by the Act.

"Thus without regard to the question as to whether the notice should have been served upon the bargaining representative or the employees, the notice failed to comply with this important provision of the statute and could well be disregarded by the employees. This action by the carrier, as well as the negotiation of the individual agreements, doubtless resulted from the position of the carrier that it was not bound by the 1917 agreement, and its further position, now abandoned, that no employer-employee relationship existed between it and the joint agents. These questions having been determined adversely to the carrier's contention, the means then employed to obtain relief from what it deemed to be burdensome terms of employment, are rendered ineffectual, and the defendant carrier is obliged to comply with the terms of the award as sought to be enforced in this proceeding."

The conclusion of the District Judge that "It was, therefore, impossible to provide the time for conferences provided by the Act," is correct. There is no question as to the dispute having been one "concerning intended changes in rates of pay."

A

The Circuit Court of Appeals erred in holding that the written notice given to every joint agent, and the securing of the consent to the arrangement of each agent affected, was all that was required to alter the rates of pay prescribed in the agreement of August 1, 1917.

The notices required by Section 2, Fourth, and by Section 6 of the Railway Labor Act of 1926 were notices intended to pave the way "for conferences between representatives." While Section 2, Second, did not set up a particular form of notice, it required all disputes to be considered in conference between representatives designated and authorized so to confer, and placed a duty upon the representatives of the carrier and of the employees to arrange a conference between them at which the dispute could be so considered. These provisions superseded the provisions of Article 14 of the Agreement permitting ex-parte or unilateral abrogation of the Agreement without conference between the representatives of the parties.

That this was the clear intention of Congress is evidenced by the third proviso of Section 2, Fourth, "That nothing in this paragraph shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties." The Act was intended to invoke the aid of conferences where there was no provision for them in existing agreements. The notices required by the statute were for the purpose of setting in motion the collective bargaining machinery. Representatives were given ten days from the receipt of the notice within which to specify (Section 2, Fourth) or agree upon (Section 6) a time and place for conference between representatives.

The holding of the Court below that "the securing of the consent to the arrangement of each agent affected" (regardless of how obtained) was sufficient to support the change of rates of pay provided in the agreement, disregards the provisions of Section 6 requiring thirty days' notice and an effort to arrange conferences between the representatives of the parties interested in such intended changes, as a condition precedent to the right of the carrier to alter the rates of pay prescribed in the agreement.

An individual employee could not agree to the abrogation of the agreement affecting the whole class of employees covered by the agreement. So long as the agreement was in force and effect, any intended changes therein, whether affecting the whole class or an individual employee, were prohibited by the Act, unless changed in compliance with the provisions of Section 6.

This Court in construing the Railway Labor Act of 1926 in *Texas & N. O. Railroad Co. v. Brotherhood of Railway & S. S. Clerks*, 281 U. S. 548, upheld the constitutionality of the Act, and said on page 568 of the opinion:

> "A definite statutory prohibition of conduct which would thwart the declared purpose of the statute cannot be disregarded."

The *Clerks'* case, supra, dealt with the distinct prohibition against coercive measures, at pp. 567 and 568 of the opinion.

The Court reasserted what it said in the *Clerks'* case, in sustaining the application of the Railway Labor Act of 1934, in the case of *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515.

In *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, this Court reiterated its view of the necessity of labor organizations as essential to give laborers opportunity to deal on an equality with their employer because a single employee was helpless in dealing with an employer.

B

The threats to remove the agency unless the individual employee accepted a lower rate than provided in the agreement is tantamount to an interference with the employee's representation by the Telegraphers.

The wholesale change in rates of pay was effected as a result of an agreement reached with Dinkins, the joint railway-express agent, at Lawtey, Florida, November 29, 1929, "with the understanding the practice will be general on the Seaboard Air Line." (R. 88).

The Express Agency, in order to secure the possible advantage of Dinkins' conditional agreement to accept $5.00 per car on car lot shipments, had to comply with the condition prescribed by Dinkins by making "the practice general on the Seaboard Air Line.". It therefore sent out the notices of March 25, 1930, and April 8, 1930, for the purpose of making the rate of $5.00 per car general on the Seaboard Air Line effective April 10, 1930.

As to the consent to the arrangement on the part of joint railway-express agents, Smith and Meares, and which was typical of the consent of other agents whose claims were denied by the Court below, the record shows:

Paul Smith, Emory, Georgia (R. 78-81)

On April 29, 1930, joint agent Smith wrote Superintendent May that it would "be necessary for him to take the regular commissions on car load shipments as there are no provisions being made on such shipments in the contract." The Agency sent agent Smith "error letters" charging him with the difference because Smith continued to deduct "the usual percentage rate of agency commissions." The company ended Smith's employment on August 7, 1931, and set up the express agent successor to Smith, at a location other than the Seaboard Air Line Railway station. On October 5, 1931, Smith meekly capitulated to the dictation of the Express Agency and agreed to accept $5.00 per car and was promptly checked in again as agent at Emory for the Express Agency.

E. Meares, McBee, S. C. (R-98-99)

The letter of joint agent Meares to Harrison, route agent for the Express Agency, dated June 16, 1930, (R-378), clearly reveals that the company had threatened to separate him from his agency, as it had done Smith at Emory. So Meares, in succumbing to the interference, influence and coercion on the part of the express Agency's representative, Mr. Harrison, agreed to refrain from handling the matter with the general Chairman and to accept the $5.00 per car rate. He was thus interfered with, influenced and coerced, in his designation of a representative by the carrier, in violation of Section 2, Third, of the Railway Labor Act.

The viciousness of the scheme adopted is that it deprives the employees of the right which experience shows it advisable for them to have, and which Congress has unequivocally declared they shall have, namely the right to bargain with management and accordingly have a voice and authority, through authorized representatives, in determining what the rights of the employees shall be.

The inescapable result of the action of the Express Agency is that if it may validly adopt this method of altering rates of pay, other carriers may pursue a similar policy with the same showing of justification. The inevitable outcome will be economic warfare caused by evading the procedural processes Congress has mandated shall be followed to avoid such strife.

The duty of the Express Agency to *maintain* agreements with its employees prescribed by the Act of 1926, obviously includes the duty to refrain from using tactics expressly condemned by the Act for the purpose of breaking down an existing agreement.

The provisions of the Act requiring good faith in the *making* of collective agreements is useless if, after such agreements

are made, the carrier can employ the sabotage tactics of interference, influence and coercion of helpless individual employees to destroy the structure which was erected in good faith. The Act compels the same good faith in the *changing* of collective bargaining agreements as it requires in their making.

Can it be that a carrier, like the Express Agency is by statute required to specify a time and place to confer with the representative of its employees where they have a grievance, (Section 2, Fourth) but is not under a legal obligation to attempt to agree upon (Section 6) a time and place for conference with representatives of its employees when it wishes to change the rates of pay and working conditions of its employees?

The question presented to this Court in this case is an important Federal question of great public interest involving the whole fabric of collective bargaining legislation and should be decided by this Court.

The right of the carrier and employee to enter into such contract as they please at the time of the original hiring is not impaired by the statute. But such right is exhausted when the hiring takes place without a specific agreement that the terms of employment are made upon some basis different from the basis provided in the collective agreement. In the absence of such specific agreement, the hiring is presumed to be upon the terms of the collective agreement, and may not be changed except after notice and conferences between the representatives of the carrier and employees signatory to the collective agreement. The provision of the Act requiring collective agreements not to be altered until after notice and conference between representatives designated and authorized so to confer, is not a restriction of the right of a carrier to make any contract it pleases when hiring new employees.

C.

The decision of the Circuit Court of Appeals is in conflict with decisions of other circuits and decisions of this Court.

The decision of the Circuit Court of Appeals in this case is directly in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in the case of *Burke v. Morphy*, 109 F. (2d) 572, certiorari denied, 310 U. S. 635.

In *Burke v. Morphy*, supra, this Court refused to review the decision of the Circuit Court of Appeals which set aside a wage cut order of a District Judge ordering the receiver of a railroad carrier to cut wages of the railroad's employees because the receiver had no money to pay the wages fixed in the collective bargaining agreements, and holding that such order was without legal justification because the Railway Labor Act "forbids any intended change in an agreement affecting rates of pay unless thirty days' notice is given to the other party to the agreement." Pay checks given employees in that case contained an endorsement purporting to constitute an acknowledgment of full payment for services up to and including the date of the draft. In this case the Telegraphers organization as representing the joint railway-express agents was well within its rights in its position that the Express Agency was violating the Railway Labor Act in making the changes with respect to rates of pay. Since the act of the Express Agency contravened the plain prohibition of the Act it was a nullity, and until the rates of pay, or the agreement affecting rates of pay were changed in accordance with the provisions of the Act, the joint railway-express agents, employees of the Express Agency, were entitled to their pay under the terms of the agreement as it existed March and April, 1930. This would be true even without a protest on the part of the employees, but by making the protest shortly

thereafter the employees made doubly sure that they were not accepting any part of the Express Agency's arbitrary alteration.

In *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 366, this Court in referring to the *Virginian* case said:

> "The effect of the decree was to order the employer to deal exclusively with the Federation, although the employee had a contract with an association not a party to the suit found to be a dominated labor organization . . . . But in all, the public right was vindicated by restraining the unlawful actions of the defendant even though the restraint prevented its performance of the contracts."

The court below declined to follow the ruling of this Court in the *National Licorice* case, supra, (R. 376) in that it construed this suit for an order to enforce the award of the National Railroad Adjustment Board as a suit upon a contract and not dealing with the assertion of public rights. This ruling by the court below is directly in conflict with the contrary ruling in the case of *Washington Terminal Co. v. Boswell*, 124 F. (2d) 235, 242, decided by the United States Court of Appeals for the District of Columbia; affirmed by this Court by a divided Court, June 14, 1943, 318 U. S. ____, where the Court of Appeals held that the National Railroad Adjustment Board is a "Public agency", performing public functions, and therefore its decisions are not without legal effect.

The decision of the court below is in conflict with the decisions of this court in *Texas & N. O. R. Co. v Brotherhood of Railway Clerks*, 281 U. S. 548; *National Labor Relations Board v. Jones & Laughlin Steel Corp.* 301 U. S. 1; *Virginian Railway Co. v. System Federation* No. 40, 300 U. S. 515; and

with the decision of the Circuit Court of Appeals for the Seventh Circuit in *National Labor Relations Board vs. J. I. Case Co.* 134 F. (2d) 70.

II

A State Statute of Limitations Is No Bar To A Suit Upon An Award of The National Railroad Adjustment Board.

The court below has intimated that if it is in error as to the Telegraphers right to recover, it is in no doubt that the bar of the statute has fallen as to the amounts sued for which accrued more than six years before the suit was filed. This ruling of the court is clearly erroneous for the reason that the suit is brought to enforce an award and order of the National Railroad Adjustment Board, and the cause of action accrued under the provisions of Sec. 153(p) of the Railway Labor Act, as amended. The only statutory limitation upon a suit brought for the enforcement of such an award is prescribed as two years under the provisions of Section 153(q) of the Act. This suit was brought within that time, and the award is enforceable in all of its terms under the provisions of the Act as interpreted by the Court of Appeals for the District of Columbia in *Washington Terminal Co. v. Boswell*, supra.

To permit the decision of the Court below to stand will pave the way for a wholesale evasion of the Act by a substantial portion of the railroads and other industries subject to related legislation.

An amendment was offered by the Chairman of the Committee of Railroads delegated to deal with the amendments to the Act of 1926, at the time such amendments were considered by the respective committees of the Senate and House of Representatives in S. 3266 and H. R. 7650. Mr. M. W. Clement, the above chairman, proposed among other amend-

'ments the following:

> "Provided, that no board created under the provisions of this section shall consider a grievance of any character the cause of which arose more than 2 years prior to the effective date of this Act." (Senate Hrgs. - S. 3266, p. 71; House of Rep. Hrgs. H. 7650, p. 137).

The proposed amendment was not adopted.

Mr. Joseph B. Eastman, testifying before the Senate Committee on Interstate and Foreign Commerce (S. 3266, p. 17, April 10, 1934), said:

> "Because of the lack of adjustment boards in many situations and the tendency of those which do exist to deadlock, very disturbing conditions have at times been created especially in recent months, in at least four important instances, strike votes have been taken for the purpose of creating an emergency which would justify the President in appointing a fact-finding board, so that these grievances and similar controversies might be passed upon by an impartial body."

Similar testimony was presented by Mr. George M. Harrison, on behalf of the standard railway labor unions. See Hearing on H. R. 7650, pp. 80-82.

Public Importance of the Issues

The issues here involved are of grave public importance. This Court will take judicial notice of the following matters of common knowledge:

> 1. That railroad and express transportation is of vital importance to the entire nation and is a critical necessity;
>
> 2. That efficient transportation depends in considerable measure upon the exercise of every reasonable effort to maintain agreements and satisfactory and harmonious relations between management and labor;

3. That employees of carriers subject to the Railway Labor Act are almost completely organized in brotherhoods and organizations, national in scope, whose jurisdictions and authorized representation have long been upheld.

4. That employees will no longer comply with terms imposed by the statute to make agreements which would avail them nothing in the face of the constant activities of the carriers seeking individual agreements with employees to gain the advantages which they were unable to gain in negotiations with representatives of the employees. This will obviously mean a return to the old system of strikes and lockouts resulting in continuous and nation-wide interruptions of the free flow of interstate commerce.

Conclusion

The Petition for Certiorari should be granted in order that this Court may review the decision of the United States Circuit Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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The Order of Railroad Telegraphers,
Petitioner.

A

Section 153, (i), (p), & (q) of the Railway Labor Act as amended, June 21, 1934:

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the

court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after."